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In The
# Supreme Court of The United States
October Term 1998

JAMES N. PATTERSON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI

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45 pp

## QUESTION PRESENTED

1. Was the Fifth Amendment Due Process Clause violated in that no rational trier of fact could have found guilt beyond a reasonable doubt?

## PARTIES TO THE PROCEEDING

The Petitioner James N. Patterson was the president of Citizens Bank of Lavaca, Arkansas, whose name was changed in 1992 to River Valley Bank & Trust (RVBT). The petitioner was also a member of the Board of Directors and a Stockholder of RVBT. The bank was chartered by the State of Arkansas and its deposits insured by the Federal Deposit Insurance Corporation (FDIC). The Respondent is the United States Government.

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Petitioner, James N. Patterson, petitions for a writ of certiorari to review the July 8, 1998, Opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the judgment entered by the United States District Court for the Western District of Arkansas entered in the District Court as a result of a jury verdict of guilty all six counts, October 6, 1997.

## OPINIONS BELOW

The judgment of the United States District Court for the Western District of Arkansas entered January 29, 1998, is not published. The Opinion of the United States Court of Appeals for the Eighth Circuit entered July 8, 1998, is not published to date.

## JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Eighth Circuit on July 8, 1998. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied August 14, 1998.

Petitioner Patterson seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The issue in this application for writ of certiorari involves the Due Process Clause of the Fifth Amendment. See Appendix C.

## STATEMENT OF THE CASE

A. *Procedural Posture*:

The Petition for Writ of Certiorari ("Petition") arises from an indictment July 16, 1997, by the Federal Grand Jury for the Western District in Arkansas charging that the defendant bank president (since 1979) James N. Patterson conspired (count five) with bank vice president Larry D. Owen some five years before in 1992, resulting in Patterson's conviction of conspiracy (18 U.S.C. § 371) and also (count six) false bank entries under 18 U.S.C. § 1005. Patterson, after jury trial, was sentenced January 29, 1998, to two years imprisonment and received a $15,000 fine. These sentences were concurrent with convictions for conspiracy, bank fraud, bank embezzlement and false bank entries (counts 1-4). Upon appeal, appellant argued vigorously the insufficiency of the evidence as to counts five and six, but these convictions, along with the others (counts 1-4), were affirmed July 8, 1998, Circuit Judge Murphy with Circuit Judge Wollman and District Judge Kyle concurring. Petitioner James N. Patterson was very much aggrieved and then argued that the Panel should modify this Opinion by rehearing (Rule 40) or that the appeal should be heard by the Court of Appeals *en banc* as provided by Rule 35. Patterson argued that consideration by the full Eighth Circuit Court was necessary to secure or maintain uniformity of decisions and, second, the proceedings involved questions of exceptional importance. The

conspiracy and false bank entries (counts 5 and 6) convictions "spilled over" and tainted all other convictions, like throwing a "bucket of tar".

On August 14, 1998, the Eighth Circuit entered an order denying the Petition for Rehearing and also the suggestion for rehearing *en banc*.

B. *Facts*:

Petitioner James N. Patterson was the president of Citizens Bank of Lavaca, Arkansas. He was also a member of the Board of Directors and a stockholder. The name of the bank was changed in 1992 to River Valley Bank & Trust. In December 1990, petitioner and Gary Carmack, Senior Vice President of the bank, alleged agreed that they would create false documents to move $14,000 from the bank's data processing account to an "EDC account". This account had been created by Patterson and five other bank officers as a result of a business created to sell debt collection policies to the bank's clientele. These facts and others are summarized in the Eighth Circuit Opinion as follows "in a light favorable to the verdict."

> The background facts are stated in a light favorable to the verdict. See *United States v. Smith, 104 F.3d 145, 147 (8th Cir. 1997).*

James Patterson became the largest stockholder and president of Citizens Bank of Lavaca, Arkansas, in 1979. Patterson ran the day to day operations of Citizens Bank, and in 1989 he and five other bank officers created Executive DC (EDC), a business to sell debt collection policies to the bank's clientele. The name of the bank was changed in 1992 to the River Valley Bank & Trust.

There was evidence relating to movement of funds within the bank by Patterson and others. In December 1990, Patterson and Gary Carmack, the senior vice president of the bank and a partner in EDC, agreed that they would create false documents to move $14,000 from the bank's data processing account to the EDC account. The money was deposited into the EDC account on December 5, without disclosure to anyone else on the bank board of directors. Later, Patterson, Carmack and Larry Owen, another bank officer and EDC partner, each withdrew $4,000 from the EDC account as a "personal bonus." The first four charges in Patterson's indictment arise from these acts.

In 1992 there were unusual transactions related to a loan and the purchase of furniture. On May 8, Patterson and Owen took out a $30,000 loan from the bank, and Patterson put the funds into the bank's bad debt reserve and falsely represented that the $30,000 credit was

from a customer loan the bank had written off in 1989. Days after the loan transaction, Patterson and Carmack bought some used furniture for the bank for $3,500 and produced false documents and an invoice to indicate that the items had been purchased for $35,000 from a fictitious company. Patterson asked Carmack to use the $35,000 invoice to create a $35,000 debt to the bank's furniture and fixtures account. Then a $35,000 cashier's check was made out to the fictitious furniture company, whose name resembled EDC. At the request of Patterson, Carmack deposited the cashier's check into the EDC account and then withdrew $30,027.86 from the account to pay off the $30,000 loan taken out by Patterson and Owen. The furniture was later sold for $35,000, and the proceeds from that sale were put back into the bank. These transactions involving the loan and the furniture are the basis for counts five and six charging conspiracy and false bank entry.

Patterson and Owen were indicted on charges of bank fraud, bank embezzlement, and two counts of conspiracy and false bank entry. Prior to this indictment, Gary Carmack had pled guilty to bank embezzlement and tax fraud for his part in the bank transactions in December of 1990. Carmack agreed to cooperate, and charges against Owen were later dropped. Patterson went to trial and was convicted on all six counts.

## ARGUMENT

### THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER THERE WAS EVIDENCE SUFFICIENT TO SUSTAIN CONVICTIONS UNDER THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

Petitioner is aggrieved by the failure of the Eighth Circuit to set aside convictions entered in the United States District Court for the Western District of Arkansas. There was no evidence or insufficient evidence to support the conviction of conspiracy as well as false bank entries (counts five and six) and, indeed, the Eighth Circuit applied the wrong standard in reviewing the evidence in view of *Jackson v. Virginia*, 443 U.S. 307 (1979) and the constitutional principle stated therein.

#### A. *The standard of review as established by the Fifth Amendment Due Process Clause.*

In *Jackson v. Virginia*, *supra*, this Supreme Court said that to review on habeas corpus state convictions under the Fourteenth Amendment the standard was:

> No rational trier of fact could reasonably conclude guilt beyond a reasonable doubt.

*Jackson v. Virginia*, *supra* held:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. ...This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

*In re Winship*, 397 U.S. 358 (1970) had established that the Fourteenth Amendment Due Process Clause prohibits criminal conviction except upon proof beyond a reasonable doubt. The constitutional standard in a federal case is the same. When the Panel below reviewed the evidence applying the standard "only if no construction of the evidence exists to support the jury's verdict," The Panel erred. See Opinion dated 7-8-98, pp.3-4, Appendix A.

Thus the Opinion of July 8, 1998, Circuit Judge Murphy, affirming convictions of conspiracy (count 5) and false bank entries (count 6), despite appellant's contention of insufficient evidence, tainted the other convictions (counts 1-4), and resulting in this request, not only to set aside the convictions arising out of counts 5 and 6, but also to grant a new trial as to counts 1-4. The Opinion ignored, overlooked,

or misapprehended the standard of review applicable to such conviction by virtue of the United States Supreme Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1997). This standard of review (again) is that "no rational trier of fact could reasonably conclude guilt beyond a reasonable doubt." The standard of review applied in the Opinion does not mention the requirements of *Jackson v. Virginia*, but holds that "our review of Patterson's argument for acquittal is quite narrow" citing on page 3, *United States v. Smith*, 104 F.3d 145, 147 (8th Cir. 1997), and, also, "we will reverse a conviction for insufficient evidence and order the entry of a judgment of acquittal only if no construction of the evidence exists to support the jury's verdict" citing *United States v. Cunningham*, 83 F.3d 218, 222 (8th Cir. 1996) at page 4. We argue that this standard of review is erroneous and ignores, overlooks or misapprehends the standard required by the Constitution of the United States as set forth in *Jackson v. Virginia* that was cited in James Patterson's original appeal on page ix, and argued therein before the Panel. The proof, as summarized by the Appellate Court in Its Opinion of July 8, 1998, was reviewed (Opinion, pp.2-4) under the wrong standard of review and the Opinion ignored or overlooked the standard required by the Fifth Amendment Due Process Clause. The test for review is the same whether made at the close of the government's case-in-chief, after presentation of all the evidence, after jury verdict, or on appeal. *United*

*States v. Austin*, 585 F.2d 1271 (5th Cir. 1978). See, also, *United States v. Campbell*, 702 F.2d 262 (D.C. Cir. 1983). Indeed, in *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), this standard of review was previously recognized by an Eighth Circuit Panel!! See *infra*.

ALSO OPINION IN
CONFLICT WITH OTHER CIRCUITS

In fact, as expected, the standard of review for sufficiency of the evidence recognized in the Ninth Circuit is that the Court must view the evidence in the light most favorable to the government whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See *United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991); *United States v. Quinn*, 18 F.3d 1461, 1465 (9th Cir. 1994); *United States v. Castaneda*, 16 F.3d 1504, 1510-11 (9th Cir. 1994); and *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994).

In *United States v. Ortiz*, 23 F.3d 21, 23 (1st Cir. 1994), the First Circuit applied the standard of whether a rational jury could have found beyond a reasonable doubt that the defendant committed the essential elements of the crime charged in reviewing the sufficiency of the evidence. In *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994), the Second Circuit held: "Not only must the evidence be viewed in the light most favorable to the government and all permissible inferences drawn in its favor [citation omitted],

but should the evidence, thus construed, suffice to convince any rational trier of fact that the crime charged has been proved beyond a reasonable doubt, then the conviction must stand." The Fifth Circuit held in *United States v. Pettigrew*, 77 F.3d 1500, 1551 (5th Cir. 1996), that a conviction could be affirmed if "viewing the evidence and the inferences that may reasonably be drawn from it in the light most favorable to the verdict, a rational trier of fact could have found that the evidence establishes the defendant's guilt beyond a reasonable doubt." The Seventh Circuit in *Bergman v. McCaughtry*, 65 F.3d 1371, 1378 (7th Cir. 1995), said that a conviction must be overturned if "viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [In *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), the Eight Circuit has held that the court must affirm a conviction unless it concludes "that a reasonable fact-finder could not have found guilt beyond a reasonable doubt."]

## WRONG STANDARD OF REVIEW APPLIED BY EIGHTH CIRCUIT PANEL IN ITS OPINION

The Eighth Circuit Panel applied the wrong standard of review. This is the first question to be addressed. While we do not dispute that in reviewing the sufficiency of the evidence to support a conviction, the appeals court should view the evidence in a light most favorable to the prosecution,

the "substantial evidence" standard is no longer valid in federal cases. See *Glasser v. United States*, 315 U.S. 60 (1942). If a challenge to a conviction in a state court on the grounds that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim, *Brown v. Davis*, 752 F.2d 1142, 1144 (6th Cir. 1985), citing *Jackson v. Virginia*, *supra*, then there should be the same standard for review under Fifth Amendment Due Process as there is under Fourteenth Amendment Due Process. This indeed was the first error in the Opinion of the Eighth Circuit Panel that found sufficient evidence against Petitioner Patterson to sustain criminal convictions.

Petitioner argued in his Eighth Circuit brief below that the standard of review was this Due Process standard.

B. *Application of the Standard of Review to Patterson's Convictions*

Applying the standard of review, no rational trier of fact could reasonably conclude guilt beyond a reasonable doubt. (First) the Indictment did not charge bank president Patterson with an intent to injure the bank. In fact, the bank profited from the transaction. (See footnote #1, appellant's brief, page 10.) Counts 5 and 6 instead charged James Patterson with conspiring with Gary Carmack and Larry Owens to falsify records of the Citizens Bank of Lavaca, Arkansas, *with the specific intent to deceive the bank's*

*examiners, directors, and officers*. The falsifications related to a transaction entered May 8-12, 1992. Both Carmack and Owens denied any intent to deceive examiners, directors, and officers in the transaction, the aim of which was to allow the bank to profit on the purchase and resale of some furniture without exciting undue comment and resistance from the eventual buyers. The transaction as booked reflected that the furniture was purchased for $35,000, when in actuality it was purchased for $3,500. The alleged "overstatement" of the bank's assets by this device amounted to three-hundredths of one percent of the total assets, a difference that did not materially affect the financial picture of the bank. The other officers and directors of the bank all said they had never heard of the transaction. Because there was no proof of specific intent, and direct exculpatory evidence from the other alleged conspirators, Patterson moved for a verdict of acquittal which was denied.

The United States Supreme Court in *In re Winship*, *supra*, held that the United States Constitution prohibits criminal conviction except upon proof beyond a reasonable doubt. [The constitutional standard in federal and state cases is obviously the same.]

When the Panel in this Opinion reviewed the evidence applying the standard "only if no construction of the evidence

exists to support the jury's verdict," pages 3-4 of the Opinion dated July 8, 1998, the Eighth Circuit Panel erred.

The standard of review for sufficiency of the evidence is that the court must view the evidence as to whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See, again, for example, *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), where the Eighth Circuit holds that the court must affirm a conviction unless it concludes "that a reasonable fact finder could not have found guilt beyond a reasonable doubt." See, also, cited *supra*, *United States v. Ortiz*, 23 F.3d 21 (1st Cir. 1994); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994); *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Bergman v. McCaughtry*, 65 F.3d 1371 (7th Cir. 1995); and *United States v. Edmonds*, 103 F.3d 822, 824-25 (9th Cir. 1996).

We do not object to the review of the evidence and the inferences that may reasonably be drawn "in the light most favorable to the verdict," but we do object to the Panel's "no construction of the evidence exists to support the jury's verdict" test. See, in particular, *United States v. Warren*, *supra*, of the Eighth Circuit.

The "substantial evidence" standard is no longer valid. [See *Glasser v. United States*, 315 U.S. 60 (1942).] Nor is any other case that sets a standard not in accord with *Jackson v. Virginia*, *supra*. The "any evidence" test was replaced.

The theory of the prosecution was false[1] and, therefore, the opinions and conclusions and factual findings in the Opinion of the Panel itself contained misconceptions and resulted in erroneous conclusions.

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1. See *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996) where the Eleventh Circuit Court of Appeals reversed the multiple mail fraud convictions of four, former top executives of General Development Company. They were convicted of defrauding homebuyers by allegedly misrepresenting the resale value and rental income which could be derived from properties. On both legal and factual grounds, the Court rejected the prosecution's theory of the case, holding that, although the defendants may have engaged in sharp and exploitative business practices, they did not commit any crimes. "The fraud statutes do not cover all behavior which strays from the ideal," the Court observed, and "Congress has not yet criminalized all sharp conduct, manipulative acts or unethical transactions." *Id.* at 1562 Quoting John Stewart Mill, the Court reminded the prosecution that "there are ... things ... which we wish that people should do, which we like or admire them for doing,
perhaps dislike or despise them for not doing, but yet admit that they are not bound to do so." *Id.* The Panel also invoked the words of Sir Thomas More: "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." *Id.* at 1562 "To be free of tyranny in a free country," the Court added, "the causeway's edges must be clearly marked." *Id.* [The decision signals the emerging sensitivity toward the evils of expansive mail fraud prosecutions.]

Assuming, as argued, that the standard of review for sufficiency of the evidence required by *Jackson v. Virginia* is whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt, it is important to note that in counts 5 and 6, bank president Patterson in 1997 (five years later) was accused of conspiracy and false bank entries based upon a belated examination of records by a bank examiner (why?), but the proof did not show specific intent [these crimes of conspiracy and false bank entries are "specific intent" crimes]. The proof did not show "conscious desire". See *United States v. Bailey*, 444 U.S. 394, 404 (1980). The proof did not show a criminal purpose. See *United States v. Fox*, 95 U.S. 670, 673 (1878). The Panel's decision overlooks, apparently, these authorities. If one desires to deceive another by "false entries" those entries should somehow be communicated to the party to be deceived. *Western Union Telegraph Co. v. Schriver*, 141 F. 538 (8th Cir. 1905). This authority was also overlooked.

There was no loss to the bank. There was no criminal profit or benefit of the "conspiracy" or ("false entries") to bank president-owner Patterson or the others. The bank in fact profited from the furniture transactions!! The alleged co-conspirator Larry Owen testified (TR 562) that he did not try to deceive or defraud the board of directors or bank officers or examiners! The alleged "co-conspirator" Gary Carmack

(INDICTMENT, p.10) testified there was no deceit! See Tr.625, 626, and 628.

While Patterson elected to not testify because of the failure of proof, confident the jury would find him "not guilty," it is obvious from the record (e.g.) that Patterson's intent was only to conceal from buyers the bargain purchase price of the furniture!!!! (See appellant's reply brief, p.6.)

It is sufficient to say that the jury verdict that we attack with respect to sufficiency of the evidence (counts 5-6) probably was the result of the overzealousness of the prosecutor (for example, his mischaracterization time and again of bank president Patterson as a "bad man"[2]), and the "spillover effect" to counts 1-4, like throwing a bucket of tar, from the jury being exposed to the "false bank entry" charges of counts 5 and 6.

The December 1990 bonus transaction of $14,000 was accomplished by a single false entry. This is the only time in the history of the bank that Patterson advantaged *himself*

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2. See appellant's brief, p.37 quoting: prosecutor argued to jury: "The face he showed to those folks, sure. Anyone may say they're truthful and honest. But when you look at his entire character and see what he was doing on the other side, it was dishonest, crooked, and thievery." (Tr.822) And, also, "If you're a person such as him and you don't have legal restrictions on you, you're going to lie, cheat, and steal." (Tr.823) These were low, foul blows.

unfairly. (Tr.635) The evidence of counts 5 and 6 unfairly resulted in his embezzlement conviction (counts 1-4) arising out of the $14,000 bonus transaction. This is the "spill over" effect. A new, fair trial is required to satisfy due process.

C. *Brief Historical Review of Background and Roots of Modern Standard of Review*

> ....This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflict in the testimony, to weigh the evidence, and to draw reasonable inferences from basis facts to ultimate facts.
>
> *Jackson v. Virginia*, 443 U.S. 307 (1979)

The idea of protecting the accused can be traced back at least two thousand years having been recognized long before it was enshrined in English common law. The Roman Emperor Trajan (52-117) pronounced "it was better to let the crime of a guilty person go unpunished than to condemn the innocent" according to the Digest of Justinian. *Coffin v. United States*, 156 U.S. 432, 454 (1895); Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, The Lawyers Co-operative Pub. Co. 692 (1938) It was a maxim of Roman law that where there was a conflict in evidence the most favorable construction to the accused

should be adopted.[3] "In all cases of doubt, the most merciful construction of facts should be preferred," *Coffin*, *id.*; Burdick, 692-693.

In mid-15th century England, Chief Justice Fortescue expressed the great principle: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally. *Coffin*, 156 U.S. at 455.

A century and a half later even the notorious Star Chamber professed to honor the principle that "it were better to acquit twenty that are guilty than condemn one Innocent." Levy, *Origins of the Fifth Amendment* 33 (1968) The relative humanity of the English judges was in marked contrast to the inquisitorial system in use on the continent. It was said, for example, of an inquisitor of the French royal court that he conducted himself as if "sacrifice of a hundred innocent men were better than the escape of one guilty." Id. at 32. In

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3. The Romans may have had a standard of proof in criminal cases even higher than beyond reasonable doubt. It was said that:

> All accusers should know that no criminal charge should be brought unless it can be supported by competent witnesses, or established by the most convincing documents, or shown by circumstantial evidence *clearer than daylight* resulting in undoubted proof.

fairness to the French, however, Voltaire iterated the great principle two decades prior to the publication of Blackstone's Commentaries.[4] See *Zadig*, ch. 6 (1747), "It is better to risk saving a guilty person than to condemn an innocent one," quoted in *Bartlett's Familiar Quotations* (14th ed. 1968), p.417a.

The principle that it is better that ten guilty escape than one innocent suffer became embedded into the English law as bedrock and was carried to the American colonies where it was received in a climate of liberty.

The presumption of innocence is not expressly set forth in the Constitution, but by the middle of the nineteenth century it was well established in the states that it was mandatory to instruct jurors on the presumption or it was reversible error. *McCormick*, Evidence 962-968 (3d ed.

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4. Blackstone, *Commentaries on the Laws of England*, 352 (1769 ed.), republished The Legal Classics Library (1983). *Coffin*, 156 U.S. at 456. *Coffin* also quoted Lord Hale (1678) that "it is better five guilty persons should escape unpunished than one innocent person should die." "It is better that ten guilty persons escape, than that one innocent suffer." Sir William Blackstone (1723-80), *Commentaries on the Laws of England*, 15th edn, 1809, vol. 4, p.358. "It is better to risk saving a guilty person than to condemn an innocent one." Voltaire (1694-1778), *Zadig*, 1747

1984); see also *Coffin*, 156 U.S. at 457-458. It was a universal practice.

In *Coffin* the Court embarked on a scholarly exegesis of the historical origins of the presumption and concluded unanimously that the presumption was basic to a fair trial and reversal for failure to instruct. 156 U.S. at 453-461 *Coffin* also engages in an enlightening explanation of the distinction between the presumption of innocence and reasonable doubt: "one is a cause, the other an effect." 156 U.S. at 460 The presumption of innocence is in the nature of evidence in favor of the accused. 156 U.S. at 459-460. *Taylor v. Kentucky*, 936 U.S. 478 (1978) held that the presumption of innocence was guaranteed as an instruction by due process. See, also, *United States v. Romano*, 382 U.S. 136 (1965); *Tot v. United States*, 319 U.S. 463 (1943); and *McFarland v. American Sugar Rfg. Co.*, 241 U.S. 79 (1916). See *Leland v. Oregon*, 343 U.S. 790, 799 (1952).

The Due Process Clause precludes states from discarding the presumption of innocence. *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2417 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977)

## REASONABLE DOUBT

The concept of proof beyond a reasonable doubt was established at common law before the adoption of the Sixth Amendment. As with the presumption of innocence, the states took the lead in requiring proof beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358, 372 (1970) (Justice Harlan) McCormick, *Evidence* 962-963 (3d ed 1984).

> The Constitution does not mention... the presumption of innocence nor does it say that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue.
>
> *Johnson v. Louisiana*, 406 U.S. at 381 (Douglas, J., dissenting)

Mr. Justice Douglas refers, of course, to *In re Winship*, 397 U.S. 358 (1970).

Justice Brennan began his analysis in *Winship* by expressing the Court's concern for the inevitability of error in decision-making. He quoted from his earlier opinion for the Court in *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "There is always in litigation a margin of error, representing error in fact-finding...." The reasonable doubt standard (he said) "is a prime instrument for reducing the risks of

convictions resting on factual error." 397 U.S. at 363. Justice Brennan then expressed the importance of certainty in decision-making to three groups: (1) the triers of fact, (2) society as a whole and (3) criminal defendants, and concluded as to each that the reasonable doubt standard was indispensable. As to the trier of fact, "the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" 397 U.S. at 364. As to the general citizenry, "use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. As to those suspected and accused, "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." *Id.*

As a result of *Winship*, the burden of proof always rests upon the prosecution. It never shifts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) See, also, *Frances v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Yates v. Evatt*, 500 U.S. 391 (1991). Moreover, as a result of *Winship* and *Jackson v. Virginia*, 443 U.S. 307, 321,

n.14 (1979), there has been a revolution in the appellate courts in evaluating the sufficiency of evidence to sustain convictions. 443 U.S. at 307. Although nominally setting a review standard for federal *habeas corpus* review, the standard established in *Jackson* has been generally applied to all sufficiency of evidence claims on appeal. The standard flows directly from *Winship* and in fact was seen by the *Jackson* Court to be a necessary complement to *Winship*. 443 U.S. at 313-318 The standard for appellate review of insufficiency of evidence claims set forth in *Jackson* is: a criminal conviction cannot be sustained if, on review of the trial record in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. 443 U.S. at 324.

D. *Conclusion as to Insufficient Evidence*

It has often been admitted, that "any experienced prosecutor will admit that he can indict anybody at any time for almost anything, before any grand jury" and this case certainly stands for that principle. See for example *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting), quoting Judge Campbell of the Northern District of Illinois. It also shows that the modern day grand jury is not the guardian of the people for which purpose it was created at Runnymede. This grand jury would have indicted a "ham

sandwich" and this error was compounded by the unfair trial and error upon appellate review by the Eighth Circuit.

## CONCLUSION

For the foregoing reasons, Petitioner James N. Patterson requests that this Court grant certiorari.

Respectfully submitted,

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Attorney of Record for
Petitioner James N. Patterson

# APPENDIX A

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

No. 98-1349

| | | |
|---|---|---|
| United States of America, | * | |
| Plaintiff-Appellee, | * | Appeal from the United |
| | * | States District Court for |
| v. | * | the Western District of |
| | * | Arkansas |
| James N. Patterson, | * | |
| Defendant-Appellant. | * | |

Submitted: June 9, 1998
Filed: July 8, 1998

Before WOLLMAN and MURPHY, Circuit Judges, and KYLE[1], District Judge.

MURPHY, Circuit Judge.

James N. Patterson appeal's his convictions and sentences for two counts of conspiracy (18 U.S.C. § 371), bank fraud (18 U.S.C. § 1344), bank embezzlement (18

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[1]The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

U.S.C. § 656), and two counts of false bank entry (18 U.S.C. § 1005). He was sentenced to two years imprisonment on each count, to run concurrently, and a $ 15,000 fine. Patterson asserts there was insufficient evidence to sustain his convictions for counts five and six (conspiracy and false bank entries), that he is entitled to a new trial on counts one through flour (conspiracy, bank fraud, bank embezzlement, and false bank entries) because the jury's consideration of those charges was tainted by evidence related to counts five and six, and that he is entitled to resentencing. We affirm.

The background facts are stated in a light favorable to the verdict. See U.S. v. Smith, 104 F.3d 145, 147 (8th Cir.1997). James Patterson became the largest stockholder and president of the Citizens Bank of Lavaca, Arkansas in 1979. Patterson ran the day to day operations of Citizens Bank, and in 1989 he and five other bank officers created Executive DC (EDC), a business to sell debt collection policies to the bank's clientele. The name of the bank was changed in 1992 to the River Valley Bank & Trust.

There was evidence relating to movement of funds within the bank by Patterson and others. In December 1990, Patterson and Gary Carmack, the senior vice president of the bank and a partner in EDC, agreed that they would create false documents to move $14,000 from the bank's data processing account to the EDC account. The money was deposited into the EDC account on December 5, without disclosure to anyone else on the bank board of directors.

Later, Patterson, Carmack and Larry Owen, another bank officer and EDC partner, each withdrew $4,000 from the EDC account as a "personal bonus." The first four charges in Patterson's indictment arise from these acts.

In 1992 there were unusual transactions related to a loan and the purchase of furniture. On May 8, Patterson and Owen took out a $30,000 loan from the bank, and Patterson put the funds into the bank's bad debt reserve and falsely represented that the $30,000 credit was from a customer loan the bank had written off in 1989. Days after the loan transaction, Patterson and Carmack bought some used furniture for the bank for $3,500 and produced false documents and an invoice to indicate that the items had been purchased for $35,000 from a fictitious company. Patterson asked Carmack to use the $35,000 invoice to create a $35,000 debit to the bank's furniture and fixtures account. Then a $35,000 cashier's check was made out to the fictitious furniture company, whose name resembled EDC. At the request of Patterson, Carmack deposited the cashiers check into the EDC account and then withdrew $30,027.86 from the account to pay off the $30,000 loan taken out by Patterson and Owen. The furniture was later sold for $35,000, and the proceeds from that sale were put back into the bank. These transactions involving the loan and the furniture are the basis for counts five and six charging conspiracy and false bank entry.

Patterson and Owen were indicted on charges of bank

fraud, bank embezzlement, and two Counts of conspiracy and false bank entry. Prior to this indictment, Gary Carmack had pled guilty to bank embezzlement and tax fraud for his part in the bank transactions in December of 1990. Carmack agreed to cooperate, and charges against Owen were later dropped. Patterson went to trial and was convicted on all six counts.

Patterson claims that he is entitled to an acquittal on counts five and six, which charge conspiracy and causing false bank entries. He says the government did not present evidence that he made the entries with the intent to deceive bank officers and examiners as required by 18 U.S.C. § 1005. The government counters that there is sufficient evidence to show that bank funds were improperly used to pay off Patterson's personal loan and that false documents were intentionally created to accomplish this. It argues that a jury could infer that the transactions had been done to deceive the bank board and bank examiners. It also points out that Patterson himself chose the overstated value ($35,000) to be used in the false documentation of the purchased furniture which was at the core of the false entry charge.

Our review of Patterson's argument for acquittal is quite narrow. See United States v. Smith, 104 F.3d 145, 147 (8th Cir. 1997). "We will reverse a conviction for insufficient evidence and order the entry of a judgment of acquittal only if no construction of the evidence exists to support the jury's verdict." United States v. Cunningham, 83 F.3d 218, 222 (8th Cir. 1996). The trial record contains evidence that Patterson

intended to defraud bank officials or examiners with the purposeful entry of false information. It is uncontested that Patterson intentionally caused false entries in the bank books. From this fact, the jury could have reasonably inferred that Patterson intended to defraud bank executives and examiners by causing the false entries. Intent may be based wholly on circumstantial evidence. See Smith, 104 F.3d at 147. It is for the jury to infer intent from all the facts and circumstances. See United States v Krepps, 605 F.2d 10 1, 104 (3rd. Cir. 1979). The jury was entitled to credit Carmack's testimony that steps were taken to cover up and disguise the transactions, even though he also claimed that they were not trying to deceive. Carmack testified that he and Patterson formulated false documents to "legitimize the whole deal" with the understanding that the more records they could show, the fewer questions they would encounter. The requisite intent could be inferred, and Patterson's claim, of insufficient evidence must fail.

Patterson contends that he cannot be found guilty because he did not personally profit from the false bank entries or the underlying transactions. As this court has pointed out, "(t)he fact that appellant did not personally profit from his criminal conduct is not a legal excuse for his action." United States v. Daugherty, 763 F.2d 970, 972 (8th. Cir. 1985). And contrary to Patterson's assertions, § 1005 does not require that the defendant's actions cause actual injury to the bank. See Krepps, 605 F.2d at 109. Patterson is also

incorrect in his assertion that the false entries must be communicated to the bank examiners or officers, for there is no such requirement under § 1005.

Patterson argues that his conviction on the first four counts should be reversed and the charges retried because of the prejudicial impact of evidence relating to counts five and six. This argument need not be discussed because the record supports the convictions on those counts and the related evidence was properly heard by the jury.

Patterson also disputes some of the court's sentencing findings. The district court found that the amount of the loss to the bank was in excess of $40,000, resulting in a five level increase to the base offense level. See U.S.S.G. § 2F1.1 It arrived at that figure by combining its findings of loss on counts one through four ($14,000) and on counts five and six ($30,027.86). The court also indicated that if the total amount of the loss were under $40,000, Patterson's conduct would warrant an upward departure to the same sentencing level. The court also found that Patterson's offenses involved more than minimal planning and enhanced his sentence by two levels.

The application of the guidelines is reviewed de novo, see United States v. Collins, 104 F.3d 143, 144 (8th Cir. 1997), but the court's factual determinations are reviewed only for clear error. See United States v. Dierling, 131 F.3d 722, 736 (8th Cir. 1997). To value the loss the district court used the commentary in Part F of the Guidelines Manual

which pertains to offenses involving fraud and deceit. See U.S. S.G. § 2FI. 1, comment. (n.7). This application note says the amount of loss "is the value of money, property, or services unlawfully taken." Id. The court did not err in using this method of valuation. The district court found that the bank funds used to pay off Patterson's personal debt, $30,027.86, were unlawfully taken because he had no legal claim to them for his private use. When this amount is added to the undisputed $ 14,000 loss on counts one through four, the total amount unlawfully taken exceeds $40,000. Because the district court did not clearly err in its findings of loss, there is no need to discuss whether Patterson's sentence could have properly been increased by an upward departure.

Patterson also disputes the finding that his convictions involved more than minimal planning, and argues there is no evidence that his offenses took more planning than is "typical for commission of the offense in a simple form." See U.S.S.G. § 2FI. 1, comment. (n.2); U.S.S.G. § 1B1.1, comment. (n.1(f)). More than minimal planning can also be found "if significant affirmative steps were taken to conceal the offense." U.S.S.G. § 1B1.1, comment. (n.l(f)). The commentary lists examples such as "creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered" or "several instances of taking money, each accompanied by false entries." Id. These examples are very close to what occurred in this case. The numerous false documents created in transactions in which

Patterson was involved were "significant affirmative steps" to hide the offense. Patterson mistakenly argues that "repetition" is required to show more than minimal planning, citing United States v. Wilson, 955 F.2d 547 (8th Cir. 1992), but that case only states that repetition may indicate more than minimal planning, not that it is required. See id. at 550. Moreover, the district court found that there was repeated use here of forged and falsified documents related to computer software, loan, and furniture scams. Its finding is not clearly erroneous.

There was sufficient evidence with which to convict Patterson on counts five and six and he has not shown entitlement to a new trial on counts one through four or to resentencing. Accordingly, the judgment is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

# APPENDIX B

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 98-1349WAFS

| | | |
|---|---|---|
| United States of America | * | |
| Appellee, | * | Order Denying Petition |
| | * | for Rehearing and |
| v. | * | Suggestion for Rehearing |
| | * | En Banc |
| James N. Patterson, | * | |
| Appellant. | * | |

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 14, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

# APPENDIX C

## UNITED STATES CONSTITUTION
## AMENDMENT V

## AMENDMENT V
## CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.